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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE NATIONAL INSIDER, INC.,

Petitioner,

vs.

BEST MEDIUM PUBLISHING CO., INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

STATEMENT OF THE CASE.

This case involves a simple and straightforward copyright infringement claim brought by plaintiff-respondent BEST MEDIUM PUBLISHING CO., INC. against defendant-petitioner THE NATIONAL INSIDER, INC. Six separate articles which appeared in plaintiff's newspaper,

The Daily Enquirer, were copied, in most instances verbatim, by petitioner and reprinted by it. At no time during the entire proceedings has defendant ever denied this fact and the Seventh Circuit Court of Appeals also noted the point, stating, "The Insider's six articles were virtually identical to The Enquirer's." (See Appendix to the Petition, p. 1a)

Defendant attempted to rest its defense on two basic propositions; that several of plaintiff's articles were not copyrightable, and that plaintiff did not purchase the right to copyright the articles from the authors and consequently did not have the right to copyright the articles. Both the trial court and the Court of Appeals rejected both these defenses.

Petitioner has failed to comply with subsection E of Supreme Court Rule 40, which requires record references in the statement of the case. Whether this failure was due to the multitude of unsupportable misstatements appearing in petitioner's statement or to mere inadvertence, the fact remains that petitioner has stated and restated these misstatements, both in the trial court and the Court of Appeals. At each stage plaintiff has pointed them out with documentation in the record. We are forced to do so again, though it is our position that even if petitioner's statement of the case were accurate, nothing contained in the petition presents a question of such magnitude to support the granting of certiorari herein.

Correction of Misstatements

1. Petition, pp. 5, 6. Petitioner states that every author stated that he had sold to respondent no more than the right to print and publish their story once, retaining all

other rights themselves. This statement is untrue. Mike Gray (Supplemental Appendix p. 13), Jim Gibbons (Supplemental Appendix p. 20) and Dennis Brian (Appendix 103) all testified to the contrary.

2. Petition p. 6. Petitioner states it did not know and had no reasonable means of knowing that the articles had appeared in respondent's publication previously. Three of the six articles (Exhibits 10, 14 and 16) were printed by The Insider after service of summons and a copy of the original complaint. As to the article which was admitted as Exhibit 2a and 2b, the editor of The Insider admitted reading the article in The Enquirer before printing the identical article in The Insider. (Appendix p. 53, 69.)

3. Petition pp. 6, 11 and 16. Petitioner seeks to gain some benefit, as it has throughout the entire proceedings, from implying some sinister or evidence-destroying motion into the fact that The Enquirer destroyed the original manuscripts. This argument ignores the uncontradicted testimony of plaintiff's editor that all manuscripts were routinely destroyed after six months and a microfilm copy retained. (Appendix 115.)

4. Petition pp. 6 and 12. Petitioner seeks here as it did in the Court of Appeals to benefit from the observation of the trial court that petitioner's evidence supported its position on the issue of custom. May we respectfully refer this court to the entire context from which the statement quoted was taken. It shows conclusively what the trial court held was that while defendant's evidence supported its position, plaintiff's evidence supported plain-

tiff's position, and plaintiff's evidence was both more impressive and less biased, and therefore entitled to greater weight.

5. Petition p. 7. Petitioner has sought throughout to place the burden on plaintiff to prove the custom of the industry. This position ignores the fact that defendant raised as an *affirmative defense* the argument that plaintiff purchased only the right to first publication and, further, that the custom of the industry was to permit subsequent publication. (See Appendix p. 11.)

6. Petition pp. 6, 15. Petitioner seeks to imply that plaintiff paid only $25-$100 for the articles in question. The truth is they paid $400 for one (Pltf. Ex. C, Supp. App. 1) $300 for another (Pltf. Ex. C, Supp. App. 23), $285 for a third (Pltf. Ex. M, Supp. App. 24), and $150 for two more (Pltf. Ex. F and H, Supp. App. 14 and 17).

II.

THERE IS NO REASON FOR CERTIORARI

A. Preliminary Statement

This case turns on established principles of copyright law and common law contract construction. There is no previously undecided issue of federal law. In fact, there is no real issue of federal law at all, but rather a dispute over conflicting evidence. There is no conflict among the circuits or with the decisions of this court. The trial court opinion is limited in its application to the evidence in the record in this case and can have no significant general impact upon the public. Lastly, the result is eminently proper as well as fair and reasonable.

B. Argument

Even if petitioner's statement of the case were accurate, there is no reason to grant certiorari.

Supreme Court Rule 19 sets forth the character of reasons to be considered by this Honorable Court in ruling on a certiorari petition. Nothing presented in the petition herein even approaches in magnitude or importance the reasons set forth in that rule. The basic underlying argument on which petitioner relies to reverse this judgment is that the trial court misconstrued the evidence. The majority of the petition is directed to this proposition. Pages 10 through 13 of the Petition are devoted to this entirely evidentiary question. The nature of the issue is made clear by petitioner's initial statement on page 10 of the Petition that since the entire case was submitted on depositions, offers of proof, answers to interrogatories, and exhibits, the findings of the trial court on the evidence "are not binding" upon the reviewing court. Apart from the fact that this is neither the proper statement of the rule (see *e.g., U.S.* v. *U.S. Gypsum,* 333 US 364 [1948]), nor what the Court of Appeals below held, it additionally shows that what petitioner seeks here is a review of the evidence. A claim of erroneous determination on the weight of the evidence is clearly insufficient to support a petition for certiorari. It is well settled that even where there is an absolute right to appeal, the Supreme Court will not undertake to review concurrent findings of fact by a trial court and a court of appeals in the absence of very obvious and exceptional showing of error. This rule, known as the "two-cour " rule, has been continuously applied in a wide variety of cases including patent (*Universal Oil Products Co.* v. *Globe Oil & Refining Co.,* 322 US 471); securities

(*J. I. Case Company* v. *Borak,* 377 US 426), admiralty (*Kellogg & Sons* v. *Hicks,* 285 US 502, *Just* v. *Chambers,* 312 US 383), labor (*Virginian Ry. Co.* v. *System Ped. N.I.,* 300 US 515) and others. Even in criminal matters, the Supreme Court noted that only in rare instances will it review the general sufficiency of the evidence. (*Scales* v. *U.S.,* 367 US 203). A granting of the Certiorari Petition herein would directly conflict with this well-established principle. The Court of Appeals here specifically held that the District Court's finding of the Enquirer's "all publication rights purchase" was justified and should not be overturned. (See Petition Appendix, p. 2[a]).

Pages 14 thru 17 of the petition parade horrible consequences that petitioner feels will result from this decision. In addition to the fact that they do not follow from the decision, they are irrelevant to the issues here presented.

Pages 18 thru 20 of the petition discuss petitioner's other main argument. It argues, as it has throughout the proceeding, that the articles dealing with Hollywood personalities were not copyrightable. In an attempt to bring the argument within one of the categories of reasons for granting certiorari, it argues that there appears to be a conflict among the circuits concerning the requirement of originality. In *Chamberlin* v. *Uris Sales Corp.,* 150 F.2d 512 (2nd Cir. 1945), cited by petitioner on page 19 of its petition, the court held that the originality requirement for copyright refers to the form of expression and not to the novelty. What was there involved was a dispute over whether defendant's rules for a card game infringed on plaintiff's copyrighted rules for the same card game. The court there noted that while similarities were present, defendant's rules were sufficiently original to avoid in-

fringement. Nothing in that case is inconsistent with the well settled rules in the field of copyright law, nor with the holding of the 7th Circuit Court of Appeals in our case.

McIntyre v. *Double-A-Music Corp.*, 179 F.Supp. 161 (S.D. Cal. 1959) and *Jackson* v. *Quickslip Co.*, 27 F.Supp. 338 (E.D.N.Y. 1939), cited at pages 19 and 20 of the petition, are similarly distinguishable from the facts of the case at bar.

While it is clear that many of the quotations attributable to the subject involved in those articles were not original, each article showed an original organization and presentation in selection of the material to meet the requirements and needs of plaintiff's publication. The evidence concerning the very thorough checkout conducted by plaintiff's employees, the manner in which the ideas for feature stories originated, how they were assembled, assigned, subsequently rewritten in certain instances, and eventually editored by the desk man for final publication all support plaintiff's position that the stories were copyrightable. These procedures were designed to insure the original and individual style and flavor of the articles.

Petitioner's citation of *Graham* v. *John Deere Co.*, 383 U.S. 1 (1966) is equally inappropriate, for it is a patent case. This court is well aware of the distinction between the law of patent and the law of copyright and the results which follow therefrom. Petitioner's argument on pages 17-18 of its petition does not detract from the well settled principles of copyright law which have been established over a period of 50 years. The trial court below and the Court of Appeals both applied these principles properly and no new principles were enunciated. Therefore nothing contained in the petition on this argument warrants the granting of certiorari.

Petitioner's third argument is based on the definition of "prevailing" party. It is based in 17 U.S.C. §116. It argues that even though it lost on six of nine of plaintiff's claims, and all six of defendant's counterclaims, it is still the prevailing party as to the three claims plaintiff voluntarily dismissed and should recover costs as to them. No case cited by petitioner in the petition nor found by respondent has ever so held. In fact the well settled rule is to the contrary. (See, inter alia, *Ryan* v. *Arabian American Oil Co.,* 18 F.R.D. 206 (S.D.N.Y. 1955) at 207, *S. A. Hirsch Mfg. Co.* v. *Childs,* 157 F. Supp. 183 (D.C. Penn. 1957), *Hines* v. *Perez,* 242 F.2d 459 (C.A. 9th, 1957), 6 Moore's Fed. Practice (2nd Ed. 1966), Par. 54.70[4], 3 Barron & Holtzoff (Rev. Ed. 1960) §1996, (p. 51)). All these authorities stand for the proposition that where plaintiff has prevailed on the majority of its claims, it is the prevailing party for purposes of the rule imposing costs against the party that did not prevail.

None of the cases cited by petitioner concern multiple copyright claims. In all but one, plaintiff won nothing, and defendant was correctly considered to be the prevailing party. In *Uniflow Mfg. Co.* v. *Superflow Mfg. Co.,* 10 F.R.D. 589 (N.D. Ohio 1950), plaintiff filed a complaint alleging both a copyright infringement and a patent infringement. Plaintiff voluntarily dismissed its copyright infringement case and the trial court, before trial on the patent case, granted the costs to defendant arising from the copyright case. Thus at the time of the entry of order, defendant was the prevailing party. Moreover, only one alleged copyright infringement was involved. Nothing in §116 of U.S.C.A. 17 supports the conclusion that where plaintiff prevails on six of its nine copyright infringement claims, it is not the prevailing party for purposes of im-

position of costs. A rule such as petitioner seeks would result in the most time consuming calculations if the costs for each claim were required to be determined. Such a rule would be unworkable and subject to grave abuse.

III.

CONCLUSION

Nothing contained in the petition for certiorari presents a question of any magnitude. What petitioner seeks is a trial de novo in the Supreme Court of the United States in the hope that this Honorable Court, in reviewing the evidence, will reach a conclusion more satisfactory to it. The only federal aspect of this case is that it arises under the copyright laws of the United States. In this respect it presents no issue which has not been determined on innumerable occasions with consistent application of well settled principles. The issue raised concerning costs is also a federal question but as in the case of the other issue, there is no conflict of opinion or unique imposition of rule. No case was cited by the petitioner, nor could any be, which supports its position. That is because the correct view is to the contrary and all cases have consistently so held. It is respectfully requested that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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